Goh Joon Hai & Ors v Malaysian Association of Certified Public Accountants

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-192-95
GOPAL SRI RAM, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
21 MAY 1996

Civil Procedure *— Injunction — Interlocutory, application for — Whether there exists serious questions to be tried*

On 22 August 1990, the Malaysian Association of Certified Public Accountants ('the respondent'), wrote to the appellants, the partners of an accounting firm, alleging that thay had contravened s 9 of the Companies Act 1965 and the association's ethical guidelines on independence. This was based on the fact that the appellants had acted as auditors for MWE Holdings Bhd, whereby one Dato' Tan Toh Hua (an ex-partner of the firm) was a director. The appellants responded by letter dated 23 August 1990 in which they requested a copy of the complaint and the accompanying documents. The request was rejected by the respondent's investigation committee by letter dated 29 August 1990. Despite the absence of the documents, the appellants answered the allegations. Subsequently, the respondents' disciplinary committee lodged a formal charge against the appellants by letter dated 17 December 1990. The appellants applied for an interlocutory injunction to stop the investigative committee from conducting a formal trial of the charge. The learned trial judge, in rejecting the application, decided that there was no serious question to be tried and that there was no damage or injury against the appellants that could be shown if the application was rejected. The appellant appealed.

Held, allowing the appeal:

In deciding whether to grant an interlocutory injunction, the court must first consider whether there are serious questions to be tried. The issue whether the refusal of the investigation committee to provide full disclosure to the appellants amounted to a failure to observe the rules of natural justice was a serious question to be tried. In this case, the learned trial judge had gone into the merits of the case and had failed to address his mind as to whether there were serious questions to be tried (see pp 331D–I and 332A–B); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, *American Cyanamid Co v Ethicon Ltd* [1975] 2 WLR 316 and *Mohamed Zainuddin bin Puteh v Yap Chee Seng* [1978] 1 MLJ 40 followed.

[Bahasa Malaysia summary

Pada 22 Ogos 1990, Malaysian Association of Certified Public Accountants ('penentang'), telah menulis kepada perayu-perayu, rakan kongsi sebuah firma perakaunan, dengan mengatakan bahawa mereka telah melanggar s 9 Akta Syarikat 1965 and garis panduan tatasusila

persatuan berkenaan dengan kebebasan. Ini adalah berdasarkan fakta bahawa perayu-perayu telah bertindak sebagai juruaudit untuk MWE Holdings Bhd, di mana seorang bernama Dato' Tan Toh Hua (bekas rakan kongsi firma tersebut) merupakan seorang pengarah. Perayu-perayu telah membalas dengan surat bertarikh 23 Ogos 1990 dalam mana mereka telah meminta salinan aduan tersebut dan dokumen-dokumen yang berkaitan. Permintaan tersebut telah ditolak oleh jawatankuasa penyiasatan penentang melalui surat bertarikh 29 Ogos 1990. Walaupun tanpa dokumen tersebut, perayu menjawab pengataan tersebut. Seterusnya, jawatankuasa tatatertib telah membuat pertuduhan rasmi terhadap perayu melalui surat bertarikh 17 Disember 1990. Perayu-perayu telah membuat permohonan untuk injunksi interlokutori bagi menahan jawatankuasa tatatertib penentang daripada menjalankan suatu perbicaraan formal atas pertuduhan tersebut. Hakim perbicaraan yang arif, dalam menolak permohonan, memutuskan bahawa tidak ada persoalan serius untuk dibicarakan dan tidak terdapat kerugian atau kerosakan terhadap perayu-perayu yang dapat ditunjukkan jika permohonan itu ditolak. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan:

Dalam memutuskan sama ada untuk memberikan injunksi interlokutori, mahkamah haruslah terlebih dahulu mempertimbangkan sama ada terdapat persoalan serius untuk dibicarakan. Isu sama ada keengganan jawatankuasa penyiasatan untuk memberikan maklumat sepenuhnya kepada perayu-perayu sama seperti kegagalan untuk mematuhi rukun-rukun keadilan asasi merupakan suatu persoalan serius untuk dibicarakan. Dalam kes ini, hakim perbicaraan yang arif telah memeriksa merit kes dan gagal mempertimbangkan sama ada terdapatnya persoalan serius untuk dibicarakan (lihat ms 331D–I dan 332A–B); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, *American Cyanamid Co v Ethicon Ltd* [1975] 2 WLR 316 dan *Mohamed Zainuddin bin Puteh v Yap Chee Seng* [1978] 1 MLJ 40 diikut.]

Notes

For cases on injunctions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1425–1725.

Cases referred to

Abraham v Law Society of Singapore [1991] 3 MLJ 359 (refd)
American Cyanamid Co v Ethicon Ltd [1975] 2 WLR 316 (folld)
Furnell v Whangarei High Schools Board [1973] 1 All ER 400 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (folld)
Mohamed Zainuddin bin Puteh v Yap Chee Seng [1978] 1 MLJ 40 (folld)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 (refd)

Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 364 (refd) A
Wiseman & Anor v Borneman & Ors [1971] AC 297 (refd)
Yeoh Ban Eng v Penang Chinese School Teachers Co-operative Society Ltd [1985] 1 MLJ 443 (refd)

Legislation referred to B

Companies Act 1965 s 9

Appeal from: Suit No R1–22–1–91 (High Court, Kuala Lumpur)

Robert Lazar (*Shearn Delamore & Co*) for the appellant. C
Hj Sulaiman Abdullah (*Anita Sockalingam* with him) (*Zain & Co*) for the respondent.

Abdul Malek Ahmad JCA (delivering the judgment of the court): We had allowed this appeal with costs here and below and had set aside the D order of the learned trial judge. We had granted the injunction as prayed in the statement of claim on 4 January 1991 until the trial of the action upon the usual undertaking for damages and had directed an early trial. We had also ordered that the deposit be refunded to the appellant. We now state the reasons.

Before the learned trial judge, the appellants had applied to restrain E the respondent from conducting the formal hearing of the respondent's disciplinary committee relating to the charges levelled against the appellants, namely that they had contravened s 9 of the Companies Act 1965 ('the Act') and art 22(1)(c) of the respondent's articles of association.

The affidavit in support of the application deposed by the first F appellant had averred that Dato' Tan Toh Hua ('Dato' Tan'), who was a partner of the firm of accountants ('Hew & Tan'), was no longer a partner with effect from 1 August 1989. In consequence thereof, Hew & Tan had acted as auditor for MWE Holdings Bhd ('MWE') of which Dato' Tan was a director.

G

The appellants had asked for the relevant documents from the respondent, but their request had been rejected. The appellants had made their representations to the respondent's investigation committee after making a file search at the Registrar of Companies which records show that Dato' Tan had resigned from Hew & Tan in Penang only on 24 April 1990. The appellants had succeeded in expunging that particular document H from the registry's records and informed the respondent, but the respondent had still referred the matter to their disciplinary committee. Hence, the application by the appellants.

Learned counsel for the appellants had, in the court below, reiterated that the refusal of the respondent's investigation committee in supplying I the documents requested had resulted in the appellants being deprived of their rights to look at and know the complaints against them, citing *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 and *Abraham v Law Society of Singapore* [1991] 3 MLJ 359. As

for the application for the injunction, he had referred to *Yeoh Ban Eng v Penang Chinese School Teachers Co-operative Society Ltd* [1985] 1 MLJ 443. He said the denial of these rights alone showed that there was a serious question to be tried and entitled the appellants to the injunction prayed for.

Learned counsel for the respondent submitted that the annual report of MWE would be in the appellants' knowledge as they were the auditors and referring to certain exhibits, argued that the appellants never requested for any document from the respondent's investigation committee.

The learned trial judge distinguished *Shamsiah*'s case as that involved dismissal of the appellant there by the Public Services Commission and it was not shown to him that the role and powers of the Public Services Commission were the same as that of the respondent's investigation committee.

He was more inclined to accept *Abraham*'s case as the position of the respondent's investigation committee was almost the same as that of the Law Society of Singapore. He held that the appellants never applied for any document from the respondent's investigation committee and that the function of the said committee was only to determine whether there is a prima facie case to be laid before the respondent's disciplinary committee.

The learned trial judge had concluded his judgment by stating that the respondent's investigation committee only need to ask the appellants to make written reports, but they were not obliged to hear them as that was within their discretion whereas it is mandatory for the respondent's disciplinary committee to give the appellants an opportunity to be heard. In agreeing with learned counsel for the respondent, he had dismissed the application of the appellants.

Before us, learned counsel for the appellants stated that Dato' Tan had retired from Hew & Tan on 31 July 1989 and thereafter had became a director of MWE of which Hew & Tan were auditors. He argued that there was no conflict of interest as envisaged by s 9 of the Act and art 22(1)(c) of the respondent's articles of association.

He added that Dato' Tan was wavering in his decision to retire. By letter dated 30 October 1989, using the letterhead of Hew & Tan, he had written:

> 30 October 1989
>
> The Chairman
> MWE Holdings Bhd
> 846, Jalan Raya
> Sungei Bakap
> Seberang Perai Selatan
> 14200 Penang
>
> Tuan,
>
> Re: Auditors — M/S Hew & Tan AF 0539
>
> I wish to inform you that I am still a partner of the Penang Branch of the above-mentioned firm. As I am a director of MWE Holdings Bhd, this

accounting firm is precluded from acting as auditors of the company by virtue of s 9 of the Companies Act 1965.

Yours faithfully
(Sgd)
Dato' Tan Toh Hua
cc (1) Hew Kiang Main
(2) Koay Soon Eng
(3) Goh Joon Hai
(4) Ong Eng Loo
(5) Registrar of Companies (your ref: AF 0539)

Before that, he had already written the following letter using his own letterhead:

25 July 1989

The Secretary
The Malaysian Association of
Certified Public Accountants
No 15, Jalan Medan Tuanku
50300 Kuala Lumpur

Dear Madam

Hew & Tan

This is to inform you that with effect from 1 August 1989, I am no longer in public practice and as such I ceased to be a partner of Hew & Tan.

Yours faithfully
(Sgd)
Dato' Tan Toh Hua
cc (1) Mr Hew Kiang Main
(2) Mr Koay Soon Eng
(3) Mr Goh Joon Hai
(4) Mr Ong Eng Loo

At around the same time, Hew & Tan had issued the following announcement:

Announcement
Retirement of Partner

We wish to announce that Dato' Tan Toh Hua will be retiring from the partnership with effect from 1 August 1989.

Dato' Tan Toh Hua was the founder in 1958 of the antecedent firm Tan Toh Hua & Partners which merged with Hew & Co in 1986 to form the present firm Hew & Tan.

After 31 years of practice, Dato' Tan wishes to retire in order to devote more time to his family business Tan Eng Seng Holdings Sdn Bhd and his other directorships.

As from 1 August 1989, Dato' Tan may be contacted at:

Wisma Selangor Dredging
South Block, 6th Floor
142-A Jalan Ampang
50450 Kuala Lumpur

A Telephone : (03) 261 6426 (3 lines)
Fax : (03) 261 0918

Hew & Tan
21 July 1989

B Then, on 7 October 1989, Dato' Tan had sent the following letter to the respondent:

7 October 1989

The Secretary
The Malaysian Association
C of Certified Public Accountants
No 15, Jalan Medan Tuanku
50300 Kuala Lumpur

Dear Madam

Hew & Tan
D

I wish to refer to my letter to you dated 25 July 1989, and have realized that the said letter is not quite specific and may cause some misconception. I wish to clarify as follows.

A With effect from 1 August 1989, I ceased to be a partner of the public accountancy firm practicing under the name and style of Hew & Tan,
E incorporating:

(a) Hew & Co;

(b) Othman, Hew & Co; and

(c) Tan Toh Hua & Partners

at Wisma Selangor Dredging, South Block, 7th Floor, 142-A Jalan Ampang,
F 50450 Kuala Lumpur.

B I am still a partner of the public accountancy firm practising under the name and style of Hew & Tan, incorporating:

(a) Hew & Co;

(b) Othman, Hew & Co; and

G (c) Tan Toh Hua & Partners

at 1st Floor, No 146-A Macalister Road, 10404 Penang.

I am still negotiating with the Penang firm regarding my retirement as partner of the Penang office and shall inform you as soon as this is finalized.

I apologize for the inconvenience. The letter of 25 July 1989 was typed
H by my secretary in haste and during the midst of my shifting out of the partnership office. I shall supply you with copies of the relevant documents if you so desire.

Yours faithfully

I (Sgd)
Dato' Tan Toh Hua
cc (1) Mr Hew Kiang Main
(2) Mr Koay Soon Eng
(3) Mr Goh Joon Hai
(4) Mr Ong Eng Loo

The appellants had also produced a letter from the Registrar of Companies dated 8 November 1989, the translation of which reads:

8 November 1989

Hew & Tan
1st Floor
146A Macalister Road
10400 Pulau Pinang

Dear Sir,

Form 5: Hew & Tan (AF 0539)

I have been directed to refer to your Form 5 dated 27 October 1989 which has been filed in this office on 27 October 1989.

It has been found that the said Form 5 has been signed by Dato' Tan Toh Hua. It has also been found that he had retired on 1 August 1989 according to the Form 5 dated 28 August 1989 which had been filed in this office on 29 August 1989.

Please clarify.

Yours faithfully,
(Sgd)
(B Muthukumaran)
for Registrar of Companies,
Malaysia

Accordingly, on the same date, the first appellant had written to the Registrar of Companies as follows:

8 November 1989

Pendaftar Syarikat
Pejabat Pendaftar Syarikat
Tingkat 16-20 Bangunan Kuwasa
Jalan Raja Laut
50350 Kuala Lumpur

Tuan,

Name of Firm: Hew & Tan (AF 0539)

In view of the various letters written to you by Dato' Tan Toh Hua, a former partner of the firm, we would like to reaffirm:

(a) Hew & Tan is a single firm with the principal office in Kuala Lumpur and a branch office in Penang as stated in our Return dated 28 August 1988.

(b) Dato' Tan Toh Hua has retired from the firm with effect from 1 August 1989.

(c) The claim by Dato' Tan Toh Hua that he is still a partner of the Penang office is untrue and without foundation.

For your information, we enclose herewith copies of the following letters which we believe will be useful in assisting you in forming your opinion in the matter:

(a) Letter dated 25 July 1989 addressed to the Secretary, The Malaysian Institute of Accountants from Dato' Tan Toh Hua.

(b) Letter dated 25 July 1989 addressed to the Secretary, The Malaysian Association of Certified Public Accountants from Dato' Tan Toh Hua.

(c) Letter dated 21 July 1989 from Dato' Tan Toh Hua to his friends and associates.

Should you require further clarification, please do not hesitate to contact us.

Yang benar
Hew & Tan

(Sgd)
Goh Joon Hai
(Partner)

The relevant form filed at the Registrar of Companies on 3 November 1989 is reproduced below:

Companies Act 1965
(Section 9 (4)(a))

Firm No
AF 0539 RETURN OF PARTNERS OF FIRM OF AUDITORS

Name of firm:	Hew & Tan	
Address of firm:	Principal office:	
	Wisma Selangor Dredging 7th Floor, South Block 142-A Jalan Ampang 50450 Kuala Lumpur	No change
	Penang Branch Office: 1st Floor 146-A Macalister Road 10400 Pulau Pinang	No change
Date of commencement of business:	Principal office: Penang branch office:	1 July 1986 1 July 1986

The full names and addresses of all the partners of the firm with relevant dates are:

Full name	Residential address	Qualification	Approval No and dates	Change and relevant dates
Hew Kiang Main	17 Jalan Delima 55100 Kuala Lumpur	FASA, PA CPA	667/3/89 (J/PH) on 1 April 1987	No change

Tan Toh Hua (Dato')	27 Langgak Tunku 50480 Kuala Lumpur	B Com (Melb) FASA, PA, CPA	132/3/89 (J/PH) on 1 April 1987	Retired on 1 August 1989
Koay Soon Eng	31 Jalan Derumun Damansara Heights Kuala Lumpur	BCom (Qld) AAUQ, AASA, FCA (Aust), PA, CPA	739/3/90 (J) on 1 April 1988	No change
Goh Joon Hai	41 Puncak Desa Taman Desa 58100 Kuala Lumpur	BA (Hons) MBA, ACA, PA, CPA	362/3/90 (J/PH) on 1 April 1988	No change
Ong Eng Loo	26 Jalan Buah Jambu Paya Terubung 11060 Pulau Pinang	B Com, AASA, ACA (Aust) ACIS, PA, CPA	993/3/90 (J) on 1 April 1988	No change

Dated 28 August 1989

(Sgd)
Goh Joon Hai
(Partner)

The appellants had also exhibited their settlement agreement with Dato' Tan on 24 April 1990.

SETTLEMENT AGREEMENT

I, DATO' TAN TOH HUA (NRIC No 3623660) of No 27, Langgak Tunku, 50480 Kuala Lumpur formerly a partner in the firm of M/s Hew & Tan incorporating M/s Hew & Co, Othman Hew & Co and Tan Toh Hua & Partners ('the firm') hereby acknowledge receipt from M/s Hew Kiang Main, Koay Soon Eng and Goh Joon Hai, the continuing partners in the firm the sum of RM101,442.88 (Ringgit Malaysia: One Hundred and One Thousand Four Hundred and Forty Two and Sen Eighty Eight only) being full and final payment of the amount due as set out in the attached schedule for the purchase by them of my entire share in the partnership business and goodwill thereof in the firm pursuant to the Memorandum of Agreement dated 18 July 1989 and I declare that I shall have no further or other claim whatsoever and howsoever against the firm and the partners thereof.

In consideration of the aforesaid matters, the remaining partners declare that they have no further claim or claims whatsoever present or future against Dato Tan Toh Hua arising out of or in connection with the firm, provided always that in the event of any legitimate claims by any third parties in respect of any suits for professional negligence or any other just cause action against the firm, then the provision of the Partnership Act 1971 shall apply.

Dated 24 April 1990.

SIGNED BY DATO' TAN TOH HUA) (Sgd)
In the presence of:
(Sgd)
(MATTHIAS CHANG)

SIGNED BY KOAY SOON ENG) (Sgd)
in the presence of:
(Sgd)
(LEE WAI NGAN)

SIGNED BY GOH JOON HAI) (Sgd)
in the presence of:
(Sgd)
(LEE WAI NGAN)

SIGNED BY HEW KIANG MAIN) (Sgd)
in the presence of:
(Sgd)
Nelly Tan

Wisma Selangor Dredging,
7th Floor, South Block,
142-A, Jalan Ampang,
50450 Kuala Lumpur.
Tel: 03-2615222
15 May 1990

On 22 August 1990, the respondent wrote to the appellants as follows:

22 August 1990

M/s Hew & Tan
Wisma Selangor Dredging
7th Flr South Block
142-A Jalan Ampang
50450 Kuala Lumpur
Attn: Mr Goh Joon Hai Private & Confidential

Dear Sirs

MWE Holdings Bhd

A report has been lodged with the investigation committee of the association that M/s Hew & Tan of 1st Floor, 146-A, Macalister Road, Penang were the auditors of MWE Holdings Bhd ('MWE') when at the material time Dato' Tan Toh Hua, a partner of the firm, was a director of the company. This would appear to contravene s 9 of the Companies Act 1965 and the association's ethical guidelines on independence.

In considering the complaint, the committee noted the following matters from the documents submitted to us:

(a) Dato' Tan Toh Hua retired from the partnership of M/s Hew & Tan, Penang office on 24 April 1990.

(b) In the annual report of MWE for the year ended 31 December 1989, it was disclosed that Dato' Tan Toh Hua was appointed a director of the

company on 1 August 1989 and M/s Hew & Tan were the auditors of the company for the year concerned.

The committee would appreciate if you could clarify the above matters.

To assist the committee in its work, we would be grateful if you could submit your reply to us by 30 August 1990.

Yours faithfully

(Sgd)
Tan Shook Kheng (Ms)
(Secretary to Investigation Committee)

The appellants replied by letter dated 23 August 1990 and the respondent wrote on 29 August 1990. The letters are reproduced below to show that the appellants did ask for the relevant documents but were not given them:

23 August 1990

The Secretary
Investigation Committee
The Malaysian Association
of Certified Public Accountant
No 15 Jalan Medan Tuanku
50300 Kuala Lumpur Private & Confidential

Dear Madam

MWE Holdings Bhd

We refer to your letter dated 22 August 1990.

We have been advised that there are serious legal implications with grave legal consequence arising from the allegation, and that we are only to reply to your letter after a careful study of the full text of the complaint and documents submitted to you.

Accordingly, we hereby respectfully request you to provide us a copy of the complaint and documents submitted for our study, after which we shall reply to your letter.

Your co-operation in the matter is highly appreciated.

Yours faithfully

(Sgd)
Hew & Tan

29 August 1990

M/s Hew & Tan
Wisma Selangor Dredging
7th Floor, South Block
142A Jalan Ampang
50450 Kuala Lumpur

Attn: Mr Goh Joon Hai Private & Confidential

A Dear Sir

MWE Holdings Bhd

We refer to your letter dated 23 August 1990.

The investigation committee has instructed me to inform you that in accordance with the procedures adopted by the committee, the complaint
B and documents submitted to the committee are not released to the member against whom the complaint has been filed.

In this regard, we would like to bring to your attention that in accordance with by-law 104 of the association, the duty of the investigation committee is to consider facts or matters which have been laid before it and to call for any further information and/or documents as the committee may consider
C necessary to enable it to decide whether or not a prima facie case has been made against the member concerned. Before reaching such decision, the investigation committee shall give the member concerned an opportunity of making written representations to it.

Accordingly, the committee shall appreciate if you could respond to the matters raised in its letter to you dated 22 August 1990 within two weeks
D from the date of this letter.

Yours faithfully

(Sgd)
Tan Shook Kheng (Ms)
E (Secretary to Investigation Committee)

Learned counsel for the appellants had submitted that they were attacking the unfair procedure adopted by the respondent whose stand was that their investigation committee only investigates according to procedure established for themselves. He maintained that although the respondent was a company
F incorporated by guarantee, their by-laws on which they relied on were not statutory. Despite the absence of documents, the appellants had answered the allegations to the best of their ability but were at risk because if they did not do so, they might be committing another offence under the by-laws.

G The formal charge came by way of letter dated 17 December 1990 which read:

17 December 1990

M/s Hew & Tan
H 7th Floor, South Block
Wisma Selangor Dredging
142-A Jalan Ampang
50450 Kuala Lumpur

Attn: Mr Goh Joon Hai Private & Confidential

I

Dear Sirs,

Hearing

The disciplinary committee of the association has instructed me to inform you that a formal complaint has been preferred against a partner or partners

of your firm by the investigation committee in accordance with by-law 104 of the association's by-laws. A

The complaint was that Hew & Tan of 1st Floor, 146-A Macalister Road, Penang, were the auditors of MWE Holdings Bhd for the year 1989/90 when at the material time, Dato' Tan Toh Hua, then a partner of the firm, was a director of the company. This would appear to contravene s 9 of the Companies Act 1965 and the association's ethical guidelines on independence contained in B Section II of the association's statement of professional conduct and ethics. This would amount to you having failed to observe the ethical rulings of the association within the meaning of art 22(1)(c) of the association's Articles of Association.

The disciplinary committee hereby gives you notice that a formal hearing of your case has been fixed for Wednesday, 9 January 1991 at 2pm C at the MACPA Boardroom at No 15, Jalan Medan Tuanku, Kuala Lumpur. At such hearing, you shall be given the opportunity of being heard and are allowed to be represented by counsel or by a solicitor or by a member of the association.

Should you fail to appear or exercise your right to be so heard, the D disciplinary committee may proceed to hear the case on the scheduled date without your presence and to take appropriate action in accordance with the articles and by-laws of the association.

Kindly inform us by 31 December 1991 whether you intend to appear at the hearing.

E

Yours faithfully
(Sgd)
Tan Shook Kheng (Ms)
(Secretary to Disciplinary Committee)

Learned counsel continued by saying that the appellants actually could not tell who was actually being charged pursuant to the first paragraph of that F letter. He said that he was aware that, in the court below, learned counsel for the respondent had argued that this was curable as Hew & Tan is described in the handbook as a member, so all partners are fixed with liability.

Assuming learned counsel for the respondent is correct, he added, G each partner may have different considerations to meet in answering the charge, for example, Hew, who is not a party to the proceedings, had retired on 1 January 1990 before the respondent's investigation committee began their inquiries, but he was a partner at the time when the alleged wrong doing took place and there had also been other partners admitted to H Hew & Tan after the complaint.

He stressed that disciplinary proceedings were punitive in nature and the charge had to be framed with the utmost clarity. After the charge was preferred, the appellants had commenced these proceedings and applied for the injunction. Because of several adjournments, the respondent had given their undertaking not to proceed. The application for injunction was I refused on 27 February 1995 despite having been filed on 4 January 1991, an unwarranted delay of over four years.

A In the court below, learned counsel for the respondent had submitted that the rules of natural justice were not applicable as the respondent's investigation committee merely carried out investigations, but learned counsel for the appellants argued before us that if the appellants could at the stage of the respondent's investigation committee show that there was B no prima facie case, the entire proceedings would come to an end and they would be spared the burden of having to answer a tribunal with disciplinary powers, namely the respondent's disciplinary committee. But then, they could not show the absence of a prima facie case as they did not have the relevant complaint and documents.

C Learned counsel for the appellants had referred to by-laws 103 and 104 of the respondent's by-laws which provides:

> Matters to be laid before investigation committee
>
> 103 It shall be the right of every member or any person to bring to the attention of the secretary any facts or matters indicating that a member or provisional member or registered student may have become liable to D disciplinary action under any provision of the articles, and in any such case, it shall be the duty of the secretary to lay such facts and matters before the investigation committee.
>
> Powers and duties of investigation committee
>
> 104(1) The investigation committee shall consider the facts or matters E which have been laid before it under the provisions of the preceding by-law and it shall have power to call for, and it shall be the duty of every member or provisional member or registered student to provide such further information and/or documents (if any) as the committee may consider necessary to enable it to decide whether or not a prima facie case has been made out against the member or F provisional member or registered student concerned, and such further information as it considers necessary to carry out its duties under this chapter. Before reaching such decision, the investigation committee shall give to the member or provisional member or registered student concerned an opportunity of making written representations to it. The committee may in its absolute discretion G give the member or provisional member or registered student an opportunity of being heard before it.
>
> (2) If the investigation committee is of the opinion that a prima facie case as aforesaid has been made out, it shall prefer a formal complaint to the disciplinary committee and shall send to such committee a summary of the facts and matters which were laid H before the investigation committee, together with a summary or copy of any representations made by the defendant to the investigation committee.

He submitted that there was no power in these articles to protect the identity of the informer and no affidavit was even filed by the respondent I raising their right to confidentiality or privilege.

In *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487, among other things, it was held:

(2) It is a well-established principle of administrative law that anything that restricts or appears to restrict the defendant's ability to present his case may be held to be a breach of procedural fairness and is thereby susceptible to judicial review. In this case, the disciplinary authority had refused to accede to the requests of the applicants' solicitors and counsel for pre-trial discovery. This was tantamount to denying the applicants their right to make written representations. The right to be heard necessarily means the right to know the case against oneself.

In *Wiseman & Anor v Borneman & Ors* [1971] AC 297 (HL (E)), Lord Donovan in his speech had said (at p 316):

> I agree that one cannot dismiss the present appeal simply by saying that proceedings before the tribunal at this stage are merely for the purpose of deciding whether there is a prima facie case and that accordingly, the rules of natural justice do not apply. Otherwise, it would be permissible for a member of the tribunal to sit even though he had advised the taxpayer in the particular transaction under scrutiny. Nor, on a careful reading of the judgments in the Court of Appeal, do I think that they take any such short cut to a decision. For myself, I agree with their conclusion that reading the section as a whole, it is clear that Parliament intended the three specified documents to be considered by the tribunal at this preliminary stage, and those three documents alone; and I reach this conclusion bearing in mind the full rights of appeal against subsequent proceedings which the section confers; and also the further considerations which I have mentioned above.

Lord Wilberforce, in his opening statement, had stated (at p 317):

> My Lords, I agree that this appeal should be dismissed, but I would base the decision on rather broader grounds than those stated in the courts below, for I cannot accept that there is a difference in principle, as to the observance of the requirements of natural justice, between final decisions, and those which are not final, for example, decisions that as to some matter there is a prima facie case for taking action.

Learned counsel for the respondent, in his reply, said that none of the authorities referred require full disclosure at the stage of investigations or in deciding whether a prima facie case had been made out. There is no such requirement in the respondent's by-laws and their investigation committee and disciplinary committee are completely separate bodies. In every investigation, he added, there must be determination, but there was no requirement for disclosure as that only arises at the stage of the respondent's disciplinary committee.

He had referred, in particular, to by-law 22(1)(a), (b) and (c) which states:

> Liability to disciplinary action
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> 22 (1) A member or provisional member or registered student of the association shall be liable to disciplinary action in any of the following cases:
>
> (a) if, in the course of carrying out his professional duties or otherwise, he has been guilty of misconduct; for this purpose misconduct includes, but is not confined to, any act or default likely to bring discredit to himself, the association or the

accountancy profession; and the fact that a member or provisional member or registered student has before a court of competent jurisdiction in Malaysia or elsewhere, pleaded guilty to or been found guilty of any offence discreditable to a member or provisional member or registered student or derogatory to the association or the accountancy profession or has in any civil proceedings been found to have acted fraudulently or dishonestly shall be conclusive proof of misconduct;

(b) without prejudice to the generality of para (a) of this article, if he has performed his professional work or the duties of his employment or conducted his practice inefficiently or incompletely to such an extent or on such a number of occasions as to bring discredit to himself, the association or the accountancy profession;

(c) if he has failed to observe any ethical rulings, accounting standards or auditing guidelines promulgated by the association;

...

and by-law 23 which reads:

23 The association shall by by-law provide for the establishment by the council of an investigation committee and a disciplinary committee and may grant to such committees full power to consider and determine in the manner set out in the by-laws of the association any complaint or facts indicating that a member or provisional member or registered student has become liable to disciplinary action under the last preceding clause. The council shall also grant to the disciplinary committee the power to order, subject to the rights of appeal set out in the by-laws that the member concerned be excluded from membership or suspended for a period not exceeding two years from membership or be reprimanded, admonished and/or fined, or that the provisional member or registered student concerned be declared unfit to become a member of the association or be reprimanded, admonished and/or fined; provided always that the member or provisional member or registered student concerned shall have had an opportunity of being heard by the disciplinary committee before any such order or declaration be made.

He said the circumstances of a given case will determine the extent of procedural fairness that ought to be accorded and in the situation of that case, the requisite amount of procedural fairness had been given. He conceded that cases may terminate at the respondent's investigation committee because of the absence of a prima facie case. He referred to the respondent's letter dated 22 August 1990 and asked what further information could the appellants really want.

Learned counsel maintained that there is no serious question to be tried and this was not a case of external accusations in the sense that all the facts and documents relevant to the inquiries are within the knowledge of the appellants. In any case, the proper stage is to approach the respondent for the documents at the disciplinary committee level when, on legal advice, the respondent would supply documents to the disciplinary committee and to the appellants.

He had referred to the comments of Lord Reid in *Wiseman & Anor v Borneman & Ors* where his Lordship said (at p 308): A

> My Lords, I agree with your Lordships that this appeal should be dismissed and I shall only add a few observations. Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle B degenerate into a series of hard and fast rules. For a long time, the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the C legislation.
>
> In the great majority of cases which come before this tribunal, all the relevant facts are known to the taxpayer and he has a full opportunity to set out in his statutory declaration all the facts which he thinks are relevant and also all arguments on which he relies. The only advantage to him of having a right to see and reply to the counter-statement of the commissioners D would then be that he could reply to their arguments. If the tribunal were entitled to pronounce a final judgment against the taxpayer, justice would certainly require that he should have a right to see and reply to this statement, but all the tribunal can do is to find that there is a prima facie case against him.
>
> It is, I think, not entirely irrelevant to have in mind that it is very E unusual for there to be a judicial determination of the question whether there is a prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So, there is nothing inherently unjust in reaching such a decision F in the absence of the other party.
>
> Even where the decision is to be reached by a body acting judicially, there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see the material against him. I do not think that a case has been made out that it is unfair to proceed as the statute directs. But I do not read the statute as preventing the tribunal from G seeking further comment from the taxpayer if in any unusual case they think that they could carry out their task more effectively in that way. If they do that, then they must allow the commissioners to reply if so advised because any decision against the commissioners is a final decision.

He had also cited *Furnell v Whangarei High Schools Board* [1973] 1 All ER 400 where Lord Morris of Borth-Y-Gest at p 410 stated: H

> The main contention advanced on behalf of the appellant is that the so-called rules of natural justice were at some stage not observed. It becomes necessary to analyse this complaint in order to ascertain against whom it is made. In argument, it was the sub-committee that was much criticized. But in the result, it was the action of the board that was mainly criticized. The I criticism related to the decision to suspend. If there had been no suspension, it is not clear whether criticism of the procedure followed would have been made.

Speight J in his judgment pointed to the difference between the committee designated by s 159 to investigate a charge and the sub-committee which may be appointed under reg 4. He said (correctly as their Lordships think):

> 'Under the 1969 Regulations, the situation is quite different. Presumably, to provide additional protection for the teachers, the committee or the individual is required only to investigate the complaint and not to determine it. Presumably, the purpose of such an investigation is to ensure that the complaint is not trivial, malicious or, in some other way, demonstrably ill founded.'

Learned counsel for the respondent had concluded by saying that the trial judge had stated that there was no serious question to be tried and no damage or serious injury to the appellant had been shown by the refusal of the application for the injunction.

After hearing arguments, we were unanimously of the considered view that the learned trial judge had not addressed his mind as to whether there is a serious question to be tried. Instead, he had gone into the merits which he should not have done.

In *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, the per curiam observation of Gopal Sri Ram JCA was (at pp 195–196):

A judge hearing an application for an interlocutory injunction should:

(1) ask himself whether the totality of the facts presented before him disclosed a bona fide serious issue to be tried. He must refrain from making any determination on the merits of the claim or any defence to it and identify with precision the issues raised and decide whether they are serious enough to merit a trial. If he finds that no serious question is disclosed, the relief should be refused. If, however, he finds that there are serious questions to be tried, he should move on to the next step of his inquiry;

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case tried. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by its grant, against the harm that would result from its refusal; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to maintain the status quo. It is a judicial discretion capable of correction on appeal. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

In *Mohamed Zainuddin bin Puteh v Yap Chee Seng* [1978] 1 MLJ 40, the facts were that the matter involved a notice of motion for an order that the interlocutory injunction granted on 11 October 1976 be set aside. It would appear from the notice as well as the affidavits supporting the application that the sole ground of the application that the injunction be set aside was

that the plaintiff had not stated the facts fully and accurately to the court, and that he had not disclosed all material facts. It was held that in applying the principles in *American Cyanamid Co v Ethicon Ltd* [1975] 2 WLR 316, the motion to dissolve the injunction should be dismissed, as there was a serious question to be tried and therefore measures should be taken to preserve the status quo.

Similarly here, since we hold that there is a serious question to be tried, the injunction should not have been refused. Accordingly, we had ordered an early trial and that the injunction is to continue until the trial is disposed of.

Order accordingly.

Reported by Kenneth Goh